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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALAN HOWARD et al., Plaintiffs, Cross-defendants and Appellants, v. ENCINO GROUP RETAIL LLC, Defendant, Cross-complainant and Respondent.	B204865 (Los Angeles County Super. Ct. No. BC342174)

APPEAL from a judgment of the Superior Court of Los Angeles County, JoAnne B. O'Donnell, Judge. Reversed and remanded with directions.

Russ, August & Kabat, Steven M. Goldberg and Eric B. Carlson for Plaintiffs and Appellants Drs. Alan Howard and Michael Simmons.

Musick, Peeler & Garrett and David A. Ossentjuk for Defendant and Respondent Encino Group Retail, LLC.

Alan Howard and Michael Simmons (collectively the dentists) appeal from the judgment entered after the trial court granted summary judgment for their landlord, Encino Group Retail, LLC (Encino Group), and its managing agent, Eric Sahn, on the dentists' complaint for breach of contract and rescission and granted Encino Group summary judgment on its cross-complaint for rent. The dispute concerns a commercial lease that permitted the dentists to use the premises for their professional offices and proscribed any other use. At the time the lease was executed, the dentists and Encino Group were unaware city ordinances prohibited use of the property to provide medical or dental services. When the dentists learned of the city's restrictions, they sought, among other things, to rescind the lease.

In rejecting the dentists' claim for rescission based on mutual mistake and finding in favor of Encino Group on its claim for rent, the trial court concluded the dentists had assumed the risk the property could not be used for the purpose identified in the lease. The language of the lease and the undisputed extrinsic evidence, however, plainly demonstrate the contracting parties' material mutual mistake as to the very essence of the contract, subjecting the lease to rescission. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Lease Negotiations*

In August 2004 the dentists identified a space in the Encino Courtyard Shopping Center owned by Encino Group as a potential site to establish a joint dental practice. They told Todd Nathanson,[1] the listing agent for the property, and Sahn, Encino Group's asset manager, they intended to use the premises to provide general dentistry services. Encino Group, its agents and the dentists all believed the property could be used for the articulated intended purpose; none expressed any uncertainty about the impact of existing

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[1] Todd Nathanson and his employer, Center Business Management (CBM), acted as a dual agent for Encino Group and the dentists in the real estate transaction. Although originally named as defendants, Nathanson and CBM were dismissed from the action after they settled with the dentists.

zoning restrictions on the intended use; and no investigations were done by either party on this issue prior to executing the lease.

2. *The Lease Provisions*

Under the terms of the lease, the dentists agreed to rent the premises for a 10-year term at an initial base rent of $7,402.50 per month for the first two years, with the rental obligation increasing each year thereafter. The lease also provided for three additional "extended" five-year terms if the dentists' chose to exercise their renewal options. The lease was executed by both dentists and by Sahn as a managing member of Encino Group on November 15, 2004.

Paragraph 6.1 of the lease required the dentists to "utilize the [p]remises for general dentistry use and for no other use or purpose." Paragraph 6.1(a) obligated the dentists not "to use the [p]remises or any part thereof for any use or purpose in violation of the laws, ordinances, regulations and requirements of the City and County wherein the [p]remises are situated."

Paragraph 6.2(a) provided Encino Group's "warranty" that the premises "compl[ied] with all applicable building codes and regulations in effect on the [d]elivery [d]ate." In the event of a violation of its warranty, Encino Group agreed to "promptly rectify any such violation at [its] sole cost and expense." In paragraph 6.2(b) the dentists agreed, "[e]xcept as provided in paragraph 6.2(a)," the dentists, at their expense, shall "promptly comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record, and requirements of any fire insurance underwriters or rating bureaus, now in effect or which may hereafter come into effect, whether or not they reflect a change in policy from that now existing, during the term or any part of the term hereof, relating in any manner to the [p]remises and the occupation and use by Lessee of the [p]remises."

Because the dentists would have to construct improvements in order to make the space usable for a dental practice, the parties negotiated a lease commencement date: According to paragraph 1.4, the lease term was to commence on the "[r]ent [c]ommencement [d]ate," defined in paragraph 3.1 as "the earlier of the substantial

completion of the Lessee's initial improvements or [o]ne [h]hundred and eighty (180) days from the date of delivery of the [p]remises by Lessor to Lessee . . . ." According to paragraph 3.1,"in the event of Force Majeure as defined in [p]aragraph 49,[2] Lessee is unable to substantially complete its initial improvements by the . . . [o]ne [h]undred and eight (180) days from the [d]elivery [d]ate, the [r]ent [c]ommencement date shall be extended by no more than sixty (60) days to the date commensurate to the delays encountered."

The lease contained an integration clause, paragraph 22, providing the lease "contains all agreements of the parties with respect to any matter mentioned herein" and "[n]o prior or contemporaneous agreement or understanding pertaining to any such matter shall be effective." In addition, the same paragraph provided that, "[e]xcept as otherwise stated in this [l]ease, the Lesee hereby acknowledges that neither the real estate brokers listed in paragraph 15 hereof nor any cooperating broker on this transaction nor the Lessor or any employee or agents of any of said persons has made any oral or written warranties or representations to Lessee relative to the condition or use by the Lessee of the [p]remises or the [p]roject and Lessee acknowledges that the Lessee assumes all responsibility regarding . . . the legal use and adaptability of the [p]remises and the compliance thereof with all applicable laws and regulations in effect during the term of this [l]ease."

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2 Paragraph 49 was a "force majeure" clause: "If by reason by [*sic*] any event of Force Majeure either party to this [l]ease is prevented, delayed, or stopped f[rom] performing any act which such party is required to perform under the [l]ease, the deadline for performance of such act by the party obligated to perform shall be extended for a period of time equal to the period of prevention, delay or stoppage resulting from the Force Majeure event, unless this [l]ease specifies that 'Force Majeure' is not applicable to the particular obligation. As used in this [l]ease, the term 'Force Majeure' shall include, but not be limited to, fire or other casualty, bad weather, inability to secure materials, strikes or labor disputes . . . acts of God, acts of the public enemy or other hostile governmental action, civil commotion, governmental restrictions, regulations or control affecting, and/or other events over which the party obligated to perform (or its contractor or subcontractors) has no control. Force Majeure shall not apply to any payment of any amounts owed by either party to the other."

Paragraph 31 provided for attorney fees: "If either party brings any action to enforce the terms hereof, the prevailing party shall be entitled to receive reasonable attorneys' fees and court costs from the other party."

3. *The 1984 Zoning Restrictions Prohibiting the Use of the Premises as a Dental Practice*

The dentists paid the initial rental deposit as provided in the lease and began the process of converting the premises to a dental office. However, in March 2005 the dentists learned in connection with obtaining building permits the entire shopping center, including the leased premises, had been subject since 1984 to zoning restrictions known as "Q (qualified) conditions" that prohibited any medical or dental offices on the property.[3] When the dentists brought this information to Sahn's attention, Sahn told them he was unaware of the Q conditions. Sahn and the dentists remarked the presence of a chiropractic office and cosmetic laser treatment center in the shopping plaza at the time the lease had been executed led them to believe zoning would not be a problem.[4]

The dentists asked Sahn to assist in obtaining relief from the Q conditions, either in the form of a formal zoning variance or some other modification that would allow them to proceed with the lease. Sahn, on behalf of Encino Group, offered to share the costs of the zoning application process and to waive some (but not all) of the rent while waiting for the requested variance to be approved, but ultimately took the position that, under paragraph 6.2(b) of the lease agreement, it fell on the dentists to ensure that they complied with all regulations.

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[3] Adopted in 1984, Los Angeles Ordinance 158,865 imposes a series of conditions limiting the use of the property. Q condition number 4 provides, there shall be "no medical clinic, medical office or medical services facility development permitted on the subject property." Although not expressly included in the language of the conditions, the City of Los Angeles and all parties to the litigation agree a dental office is a prohibited use.

[4] The dentists later learned that in 1998 the Q conditions had been modified to allow chiropractic care and hair removal services in the shopping center.

4. *The Instant Action*

On October 28, 2005 the dentists sued Encino Group and Sahn for breach of contract and negligent misrepresentation and sought alternative remedies of specific performance, damages, rescission based on negligent misrepresentation and mutual mistake and a judicial declaration of their rights and obligations under the lease.

On March 22, 2006 Encino Group filed a cross-complaint for breach of contract seeking, among other things, rent owed. Alternatively, Encino Group sought to rescind the lease, alleging it had entered into the lease agreement with the dentists "under a material mutual mistake of fact in that they believed that the [p]remises could be used as a dental practice" and did not contemplate at the time the agreement was executed that "applicable zoning regulations" might prohibit such use.

5. *The Dentists Terminate the Lease and Surrender the Premises*

On June 1, 2006 the dentists, having had difficulty obtaining a variance to circumvent the Q conditions, terminated the lease and surrendered the premises to Encino Group, making clear its actions were "without prejudice to any party's right to seek and recover any other remedy they may have against any other party arising under the terms of the [l]ease or applicable law."

6. *Encino Group and Sahn's Motion for Summary Judgment or, in the Alternative, Summary Adjudication*

On June 28, 2006 Encino Group and Sahn moved for summary judgment or, in the alternative, summary adjudication on the dentists' complaint. They argued paragraphs 6.2(b) (requiring Lessees to comply with "all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record" relating to the premises) and 22 (Lessee assumes "all responsibility regarding . . . the legal use and adaptability of the [p]remises and the compliance thereof with all applicable laws and regulations") imposed on the dentists the duty to ensure their intended use was legally permitted. Encino Group also argued the claims for specific performance and rescission were "moot because the dentists had voluntarily terminated" the lease and surrendered possession of the premises.

7. *The Dentists' Motion to Amend Their Complaint*

On July 21, 2006, before their opposition to the motion for summary judgment was due, the dentists filed a motion seeking leave to amend their complaint, including with their motion a copy of their proposed amended complaint. The proposed amended complaint sought to (1) add new causes of action against Encino Group and Sahn for fraud and breach of fiduciary duty and a new breach of contract claim based upon Sahn's failure to act as a construction manager; (2) add Nathanson, CBM and CBM's owner, Richard Rivera, as defendants, with claims against each of them for negligence, negligent misrepresentation, fraud, breach of fiduciary duty and declaratory relief; and (3) withdraw its claims for specific performance and declaratory relief.

Encino Group and Sahn opposed the motion, arguing it was a ploy to avoid summary judgment and granting the motion—and continuing the trial date—would be prejudicial.

On August 15, 2006 the court granted the motion in part, allowing the dentists to add CBM, Rivera and Nathanson as defendants and to withdraw their claims for specific performance and declaratory relief, leaving only the claims for rescission, negligent misrepresentation and breach of contract. In all other respects the court denied the dentists' motion to amend their complaint.

8. *The Dentists' Opposition to the Motion for Summary Judgment*

On September 7, 2006 the dentists filed their opposition to Encino Group and Sahn's motion for summary judgment or, in the alternative, summary adjudication. Providing evidence that Sahn and Nathanson had expressly told them the property was suitable for a dental practice, the dentists argued, at a minimum, triable issues of material fact precluded summary judgment on both the negligent misrepresentation claim and the claim for rescission based on negligent misrepresentation. In addition, citing paragraph 6.2(a), the dentists argued their breach of contract claim was meritorious because it was Encino Group's obligation to deliver the property free of any code violations and to rectify any problems in that regard at its "sole cost and expense." Although pleaded in

their complaint, the dentists did not raise the issue of mutual mistake in their opposition to Encino Group and Sahn's motion.

9. *The Trial Court's Order Denying Summary Adjudication of Issues But Granting Summary Judgment in Favor of Encino Group and Sahn*

On October 2, 2006 the trial court denied Encino Group and Sahn's alternative motion for summary adjudication of issues because their separate statement failed to comply with rule 3.1350(b) of the California Rules of Court requiring the moving party to indicate which defendant (Encino Group or Sahn) was entitled to summary adjudication on which cause of action. The court thus treated the motion solely as one for summary judgment. It concluded Encino Group and Sahn were entitled to judgment on the complaint as a matter of law, explaining: (1) the rescission claim was moot because the dentists had already surrendered the premises;[5] (2) the negligent misrepresentation claim failed as a matter of law because the lease's integration clause precluded the admission of any evidence offered to vary the terms of the written agreement;[6] (3) the breach of contract claim failed as a matter of law because neither Encino Group nor Sahn had any obligation to deliver the property free from the Q conditions or to assist the dentists in obtaining a variance. Rather, under paragraphs 6.2(b) and 22 it was the dentists' obligation to do whatever was necessary to comply with any regulations pertaining to their occupation of the premises; they had assumed the risk existing zoning restrictions prohibited their intended use of the premises.

10. *The Parties' Cross-motions for Summary Judgment on Encino Group's Cross-complaint for Rent Owed*

On March 23, 2007 Encino Group moved for summary judgment on its cross-complaint seeking $66,654 in rent for the period July 2005 through May 31, 2006 (when

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5 The court reasoned, "As the lease has been terminated, there is no contract to rescind."

6 The court sustained Encino Group's objections to the evidence of Sahn's and Nathanson's oral representations concerning the suitability of the property for a dental practice.

the premises were surrendered), plus prejudgment interest and attorney fees in accordance with the attorney-fee provision in the lease.[7]

On March 28, 2007 the dentists filed their own motion for summary judgment on Encino Group's cross-complaint, arguing they were entitled to judgment as matter of law based on their affirmative defenses of mutual mistake, legal impossibility and frustration of purpose.

On June 7, 2007 the trial court granted Encino Group's motion and denied the dentists' motion. The court found mutual mistake inapplicable because paragraph 6.2(b) expressly assigned to the dentists "all risks and responsibility" for zoning and use restrictions. The court explained language in that paragraph of the lease implies "that there was a possibility that the planned use might not be allowed; thus there was doubt regarding the existence of the subject matter of the contract (that the only use of the premises allowed under the lease as dentist's office was legally permitted) and the dentists cannot rely on the affirmative defense of mistake."

The court similarly rejected the affirmative defenses of legal impossibility and frustration of purpose, concluding there was no evidence that it was "impossible" to obtain a variance and, in any event, the dentists had "assumed the risk that the applicable zoning regulations might make it difficult—or even impossible—for them to use the premises as dental offices. Having assumed such a risk, the dentists cannot now avoid their obligations by asserting impossibility or frustration of purpose."

The court entered judgment in favor of Encino Group on both the dentists' complaint and Encino Group's cross-complaint and awarded Encino Group $66,654 in damages, as well as $332,553.49 in attorney fees.

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[7] In its motion Encino Group abandoned its rescission claim, stating, "Due to the Court's determination in its October 2, 2006 Order that the [l]ease was voluntarily terminated by the parties as of June 1, 2006, Encino Group's Third Cause of Action for Rescission, no longer serves any purpose."

DISCUSSION

1. *Standard of Review*

We review the trial court's grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348, Code Civ. Proc., § 437c, subd. (c).)

When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to "show [] that one or more elements of the cause of action . . . cannot be established" by the plaintiff. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) "[T]he defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.'" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 849.)

A defendant may also move for summary judgment on the ground there is an affirmative defense to the action. (Code Civ. Proc., § 437c, subds. (*o*)(2), (p)(2).) Once the defendant has made a prima facie showing of all the elements of the affirmative defense, the burden shifts to the plaintiff to show there is one or more triable issues of material fact regarding the defense. (*Jessen v. Mentor Corp*. (2008) 158 Cal.App.4th 1480, 1484 ["[w]hen a defendant moves for summary judgment on the ground there is an affirmative defense to the action, the burden shifts to the plaintiff to show there is one or more triable issues of material fact regarding the defense after the defendant meets the

burden of establishing all the elements of the affirmative defense"]; *Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802, 806-807 [once defendant establishes the existence of an affirmative defense, burden on summary judgment shifts to the plaintiff to produce evidence establishing a triable issue of material fact refuting the defense].)

In performing our de novo review of the trial court's orders granting summary judgment on both the complaint and the cross-complaint, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *The Trial Court Erred in Granting Encino Group's Summary Judgment Motions on the Complaint and Cross-complaint*

a. *The law governing mutual mistake*

Absent conflicting extrinsic evidence, the interpretation of a written lease, like any other type of contract, is a question of law. (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) In interpreting the contract the court's objective is to give effect to the mutual intent of the parties as it existed at the time they entered into their agreement. (Civ. Code, § 1636; *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1126 (*Wolf*).) That intent is interpreted according to objective, rather that subjective, criteria. (*Wolf,* at p. 1126; see also Civ. Code, § 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"]; Civ. Code § 1638 ["language of a contract is to govern its interpretation"].)

Mutual consent is an essential element of any contract. (Civ. Code, §1565.) "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." (Civ. Code, § 1580.) If both parties are mistaken on a matter that goes to the very essence of the contract, there is no mutual consent and, consequently, no contract. (See, e.g., *Balistreri v. Nevada Livestock Production Credit Assn.* (1989) 214 Cal.App.3d 635, 641-642 ["'[i]n certain cases where there is a mutual misunderstanding regarding the

identity of the subject matter of the contract, and either both parties are at fault in creating the mistake, or neither of the parties is at fault, there is no meeting of the minds as to a material matter, and no contract is formed'"]; Civ. Code, § 1567 [there is no consent if contract product of mutual mistake]; see also 1 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 1:115, pp. 397-398 (10/2003); ["Parties enter into a contract with certain intentions based on their knowledge, or assumed knowledge, of certain facts and legal principles. If one or both of the parties are in error and the facts or law[s] are different than they understand, there is a 'mistake' that may affect a true 'meeting of the minds,' and may give one or both parties remedies to avoid their obligations as provided in the contract."].)

A mutual mistake, whether of fact or law, which affects an essential element of the contract and is harmful to one of the parties, makes the contract voidable and subject to rescission at the election of the party harmed. (Civ. Code, § 1689, subd. (b)(1) [contract that is product of mistake subject to rescission]; *Hedging Concepts Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1421; *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1486.) Although extrinsic evidence is generally not admissible to vary or contradict the clear and unambiguous terms of a written, integrated contract (Code Civ. Proc., § 1856, subd. (a); *Wolf, supra,* 162 Cal.App.4th at p. 1126; *Cerritos Valley Bank v. Stirling* (2000) 81 Cal.App.4th 1108, 1115-1116), such evidence is admissible to show the contract is subject to rescission for, among other things, lack of mutual consent. (See, e.g., *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 525 [court may consider extrinsic evidence in determining whether a mutual mistake has occurred that demonstrates lack of mutual consent]; *Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 985 [same].)

b. *Because the lease was the product of the parties' material mutual mistake, the court erred in granting Encino Group summary judgment and denying the dentists summary judgment on the cross-complaint*

Paragraph 6.1 of the lease specifically provides the premises may be used "for general dentistry and for no other use or purpose." Paragraph 6.1(a) augments this use

provision, articulating the dentists' agreement not to "use or suffer or permit any person or persons to use the [p]remises or any part thereof for any use or purpose in violation of the laws, ordinances, regulations and requirements of the City and County wherein the [p]remises are situated." Both provisions, virtually ignored by Encino Group in each of its summary judgment motions and on appeal, are significant. They identify the very purpose for the lease and prohibit the dentists from using the premises in violation of either that purpose or the laws and ordinances in effect during the lease term. The unmistakable—and material—implication of both provisions is that the premises were capable of being used for the intended purpose articulated in the lease.

On this point the Supreme Court's opinion in *Hannah v. Steinman* (1911) 159 Cal. 142 is dispositive. In *Hannah* a lessee contracted to lease unimproved property in San Francisco for the express purpose, articulated in the lease, of erecting wooden buildings on the premises. When they entered into the agreement, the contracting parties did not know a recently enacted ordinance prohibited construction of wooden buildings on certain property, including the subject premises.

The Supreme Court concluded the lease was subject to rescission based on the parties' material mutual mistake and resulting absence of mutual consent: "The evidence demonstrates that the parties negotiated and executed the lease upon the assumption that a wooden building could lawfully be constructed upon the demised land, and that such was the use to which the Lessee must put the land and was the main inducement of the contract. Without the right to construct such a building, it could be of no substantial value to any one holding a lease for only five years who was required to pay any substantial rent. While there was no mistake as to the identity of the land itself, without that right and viewed with reference to a lease for only five years the land was a substantially different thing from the land supposed to be contracted for. . . . If an effectual prohibition against a wooden building on this lot had been imposed by the terms of a prior conveyance, and this lease had been given and received in ignorance of the existence thereof, it would probably not be questioned that the mistake would be of such a nature as to enable the Lessee to rescind, the prohibition amounting to a practical and

material impairment of the estate contemplated by the parties. Here we have practically the same result because of an ordinance of the city of which the parties were ignorant. We cannot believe that the equitable rules relative to mistake should be so narrowly construed as to require us to hold that this mistake did not go to the very essence of the contract between these parties." (*Hannah v. Steinman, supra,* 159 Cal. at pp. 149-150.)

The facts in *Golem v. Fahey* (1961) 191 Cal.App.2d 474 are also particularly apposite. In *Golem* a lessee contracted to lease 11 acres of land for 99 years. The lease specified the land would be used for commercial purposes. After the lease had been executed, one of the real estate brokers discovered the property was zoned for agricultural purposes and could not be used for the purpose articulated in the lease unless the property was rezoned. The parties attempted to get the property rezoned, but those efforts were not completed. After the landlord sued for rent, the lessee answered the complaint, pleading mutual mistake and seeking rescission. Finding *Hannah v. Steinman, supra,* 159 Cal. 142 controlling, the Court of Appeal held the lease was the product of a material mutual mistake: "Not only does the testimony reveal that all persons concerned with the transaction were under the impression that the property leased could be used for commercial purposes, but even more persuasive is the lease itself which requires a commercial use." (*Golem,* at p. 475.)[8]

Attempting to distinguish *Hannah v. Steinman, supra,* 159 Cal. 142 and *Golem v. Fahey, supra,* 191 Cal.App.2d 474, Encino Group observes that mutual mistake is inapplicable when the contract expressly allocates to one of the contracting parties the risk of the alleged mistake. (See, e.g., *Moreno Mutual Irrigation Company v. Beaumont Irrigation District* (1949) 94 Cal.App.2d 766, 782 (*Moreno*) [where "'the contract concerns a matter about which there may be some doubt, and it appears that the existence

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[8] The court in *Golem* concluded the contract would ordinarily be subject to rescission, but denied that relief because of the lessee's failure to comply with Civil Code requirements governing rescission. (*Golem v. Fahey, supra,* 191 Cal.App.2d at pp. 476-477.) The dentists' compliance with the Civil Code's mandates concerning the notice of rescission is not at issue here.

of the thing was not an implied condition, but that the party intended to take the risk, then it is no answer to the enforcement of the agreement that the thing did not actually exist'"]; *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 885 (*Guthrie*) ["Where parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain. [Citations.] Otherwise stated, the kind of mistake which renders a contract voidable does not include 'mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk.'"].)

In contrast to the circumstances in the cases cited by Encino Group, the parties here did not identify a doubt about the ability of the dentists to use the property for the only contractually-authorized purpose or expressly allocate the risk the property could not be used for that purpose. (Cf. *Moreno, supra,* 94 Cal.App.4th at p. 783 [party who entered into stipulated judgment concerning water rights could not rescind the stipulation based on mutual mistake of fact that a certain subterranean reservoir water basin existed when it did, in fact, not exist; from the beginning, as reflected in the parties' dispute resulting in the stipulation, "the question [about the existence of the reservoir] was in doubt and the parties entered into the stipulation and judgment knowing it was in doubt"]; *Raddue v. Le Sage* (1956) 138 Cal.App.2d 852, 856 [agreement to purchase merchantable timber not subject to rescission based on mistake that there was a smaller quantity of timber than the 3.5 million board feet anticipated; language in purchase agreement showed parties knew the amount of timber could not be determined with certainty prior to being harvested and included provisions altering the price in the event the amount was less than anticipated].) Rather, it is clear from both the language of the lease itself and the undisputed extrinsic evidence the dentists, on the one hand, and Encino Group, on the other hand, assumed city ordinances would not prohibit operation of a dental office at the shopping center—the only authorized use identified in the lease.

Encino Group's reliance on paragraph 6.2(b) to support its argument is misplaced. That paragraph provides only that the dentists will promptly comply with all applicable

statutes, ordinances, rules and regulations relating to their occupancy and use of the premises. In effect, it contemplates compliance with the laws in accordance with the use mandated under the lease. It does not express any uncertainty about the lawfulness of that contemplated use or allocate the entirely unanticipated risk that the only authorized use may be prohibited. Moreover, to the extent there is any ambiguity in provision 6.2(b), the undisputed extrinsic evidence confirms that all parties understood there was no impediment to using the property as a dental office. There was no allocation of risk, only a fundamental mistake as to the essence of the lease. (See *Hannah v. Steinman, supra,* 159 Cal.142; *Golem v. Fahey, supra,* 191 Cal.App.2d 474.)

Paragraph 22, also cited by Encino Group to support the trial court's decision, is inadequate to prevent application of the mutual mistake doctrine. That paragraph provides the Lessee "assumes all responsibility" regarding the "the legal use and adaptability of the [p]remises and compliance thereof with all applicable laws and regulations in effect during the term of this lease." Far from evidencing a doubt about the ability to use the premises in the manner identified or imposing an additional due diligence requirement on the dentists, the contractual language plainly suggests a term in which the dentists may utilize the property in accordance with the use provisions in the lease, at least at the outset of the lease term. (See Civ. Code, § 1641 ["whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"]; *City of Atascadero v. Merrill Lynch* (1998) 68 Cal.App.4th 445, 473.) Indeed, Encino Group's argument to enforce the contract despite existing zoning regulations precluding the specific and singularly authorized use in the lease would effectively render the entirety of the lease meaningless. (See Civ. Code, § 1638 [contract to be interpreted consistent with contractual language and to avoid absurdity]; *Wolf, supra,* 162 Cal.App.4th at p. 1136.)

In sum, the language of the lease and the undisputed extrinsic evidence demonstrate the parties entered into an agreement under a material mutual mistake affecting the essence of the contract, resulting in a lack of mutual consent and rendering its provisions unenforceable. (*Hannah v. Steinman, supra,* 159 Cal. 142; *Golem v.*

Fahey, supra, 191 Cal.App.2d 474.) Accordingly, the trial court erred in granting Encino Group's summary judgment motion on the cross-complaint to enforce the lease's rent provisions.

c. *The trial court erred in granting Encino Group's summary judgment motion directed to the dentists' complaint*

The trial court also erred in granting Encino Group and Sahn's motion for summary judgment on the dentists' complaint. As discussed, that complaint alleged causes of action for breach of contract and negligent misrepresentation and sought not only damages but also rescission based on mutual mistake and negligent misrepresentation. Because the trial court denied the alternative motion for summary adjudication—a ruling not before us in this appeal—if Encino Group failed to establish its right to judgment as a matter of law as to each of those causes of action, the motion for summary judgment was properly denied. (See *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 929 [summary judgment in favor of defendant inappropriate where defendant failed to adequately address each cause of action alleged in complaint].)

With respect to the dentists' rescission claim, in support of their motion for summary judgment, Encino Group and Sahn asserted only that the claim was moot in light of the dentists' surrender of the property. Although the trial court agreed with Encino Group's analysis, we do not.[9] If the lease agreement is voidable under the doctrine of mutual mistake, as we have held based on the evidence before the trial court on the cross-motions directed to Encino Group's cross-complaint for unpaid rent,[10] then the dentists are entitled to rescind the agreement. Whether or not the property itself has

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9 We agree surrender of the property would moot the dentists' cause of action for specific performance, a claim the dentists had withdrawn by the time the trial court ruled on the motion for summary judgment.

10 Had the dentists brought their own motion for summary adjudication on their rescission claim supported by the same evidence contained in the cross-motions directed to the cross-complaint, we very likely would have directed the court to grant that motion. However, because no such motion was made, we hold only the trial court erred in granting Encino Group's motion for summary judgment on the dentists' complaint seeking, among other things, rescission of the lease.

been surrendered does not moot other issues relating to the parties' obligations, if any, under the lease agreement (for example, the dentists' obligation to pay rent for the period prior to return of the property). Having presented no argument other than this erroneous theory of mootness as to the dentists' claim for rescission, the motion for summary judgment on the complaint should have been denied. (See Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra,* 25 Cal.4th at p. 850 [movant must successfully meet initial burden of production and persuasion showing claim to be without merit; only then does burden of production shift to opposing party to make a prima facie showing of the existence of a triable issue of material fact].)[11]

3. *The Trial Court Did Not Abuse its Discretion in Denying the Dentists' Motion to Amend the Complaint*

The trial court's decision on a motion to amend a pleading is inherently a discretionary one. (Code Civ. Proc., § 473, subd. (a)(1), 576; *Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) "Although courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial [citations], this policy should be applied only 'where no prejudice is shown to the adverse party . . . .' [Citation.] A different result is indicated 'where inexcusable delay and probable prejudice to the opposing party' is shown." (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.)

The dentists contend the court abused its discretion in denying their motion to amend their complaint to include new causes of action for fraud and breach of fiduciary duty, as well as a new cause of action for breach of contract based on Encino Group's failure to act as a construction manager pursuant to paragraph 46 in the lease. The

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11 Our conclusion regarding the parties' mutual mistake raises a serious question as to the viability of the dentists' breach of contract claim. We also have considerable doubt whether the dentists can prove justifiable reliance in connection with their negligent misrepresentation claim in light of express language in the integrated lease agreement acknowledging a lack of reliance on any prior representations made by Encino Group or its agents. Nonetheless, because the trial court denied Encino Group and Sahn's motion for summary adjudication and neither has appealed from that ruling, those claims remain pending.

motion to amend, filed only after Encino Group and Sahn had filed their summary judgment motion, provided no explanation for the delay in attempting to assert new causes of action for fraud and breach of fiduciary duty, which were based on the same facts as identified in the dentists' pending cause of action for negligent misrepresentation. Instead, the dentists endeavored to justify their delay solely in relation to their new proposed breach of contract claim, asserting they had only discovered during Sahn's deposition that Sahn had "disavowed" his obligation to act as construction manager for the project, including obtaining all necessary variances. Even if that were true, the court determined, the dentists still waited more than four months after Sahn's deposition to seek to amend their complaint, filing the request only after he and Encino Group had moved for summary judgment. The court found the dentists' proffered justification for the delay—they were waiting for Sahn to sign his deposition and hoped to negotiate a joint stipulation to allow the amended complaint—insufficient. In light of the delay and prejudice to Encino Group and Sahn, including the impact of the amendments on the summary judgment motion and the necessary continuance of the trial date, the court denied the request to amend the complaint. On this record we cannot say that decision was an abuse of the trial court's broad discretion in these matters. (*Record v. Reason, supra,* 73 Cal.App.4th at p. 486 [ruling of trial court on motion to amend pleading "'will be upheld unless a manifest or gross abuse of discretion is shown'"]; cf. *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 693-694 ["[g]iven lack of any excuse for not pleading the defense earlier—the decision not to plead negligence was legal gamesmanship in its purest sense—we cannot say the trial court abused its discretion in denying the request to amend"], fn. omitted.)

DISPOSITION

The judgment, including the award of attorney fees to Encino Group, is reversed. On remand the trial court is directed to (1) vacate its October 2, 2006 order granting summary judgment in favor of Encino Group and Sahn as to Howard and Simmons's complaint and enter a new order denying that motion; (2) vacate its June 7, 2007 order granting summary judgment in favor of Encino Group on its cross-complaint and denying

Howard and Simmons's motion for summary judgment on the cross-complaint and enter new orders denying Encino Group's motions for summary judgment and granting Howard and Simmons's motion for summary judgment on the cross-complaint based on the affirmative defense of mutual mistake; and (3) conduct further proceedings not inconsistent with this opinion. Howard and Simmons are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.